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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

WILEY BRANTON _____ *Petitioner*

v. No. 162

STATE OF ARKANSAS _____ *Respondent*

RESPONSE AND BRIEF THEREON TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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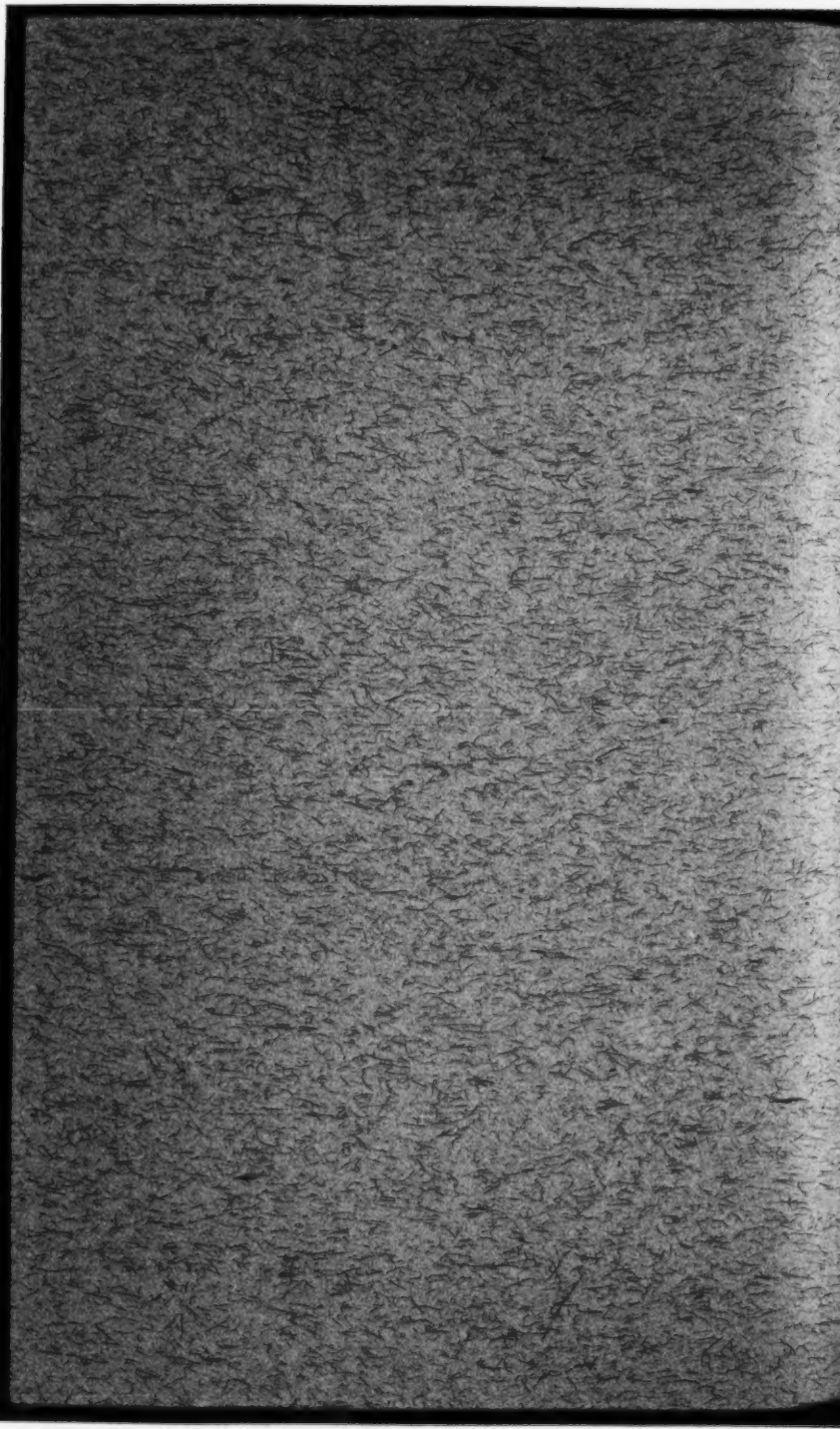

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STATUTE INVOLVED

Pope's Digest 4873: "It shall be unlawful for any person to make any threat or attempt to intimidate any elector or his family, his business or his profession, and it shall also be unlawful to prevent any qualified elector from voting at any primary election. It shall be unlawful to print or distribute any ballots outside of those ballots ordered for use in the election, for the purpose of instructing voters how to vote. It shall be unlawful for any person to attend any voting place on election day and hand out or give away any campaign cards, placards, or other articles for the purpose of influencing the electors to vote for any candidate. Any violation of any of the provisions of this section of this act shall be deemed a misdemeanor and

punished by a fine not exceeding Five Hundred Dollars'' ($500.00).

STATEMENT

The General Assembly of the State of Arkansas in the year 1935 passed Act 123, the above statute being Section 20 of the act. The purpose of Act 123, as stated in the title of the act, ''being an act to prevent illegal or improper voting in any general or special legalized election in the State of Arkansas and to supplement the procedure in primary election contests and to provide for the proper assessment and payment of poll taxes in the State of Arkansas, and for other purposes''.

On August 21, 1948, the Prosecuting Attorney in and for the Eleventh Judicial Circuit of the State of Arkansas, of which Jefferson County, Arkansas, forms a part, filed an Information in the Municipal Court charging that the Petitioner, Wiley Branton, did on or about the 3rd day of August, 1948, commit the crime of misdemeanor by violating the above Section 4873 of Pope's Digest (R.1). The defendant, after hearing in the Municipal Court, was convicted and sentenced to pay a fine of Three Hundred Dollars ($300.00) and the cost of the prosecution. On August 28, 1948, he filed an appeal bond, appealing the conviction to the Circuit Court of Jefferson County. On October 14, 1948, the case was tried on appeal in the Jefferson Circuit Court, resulting in a verdict of guilty and the assessment of a fine of Three Hundred Dollars ($300.00) (R.3). The conviction was appealsd to the Supreme Court of Arkansas in due time and on March 7, 1949, the judgment of the Circuit Court was affirmed (R.37-42). On April 4, 1949, Petition for Re-hearing was denied (R.43).

The proof revealed that prior to the Democratic Primary election on August 10, 1948, the Democratic Central Committee in Jefferson County prepared the official ballot for use in the Primary election on August 10th (R.7). The undisputed testimony showed that on August 3rd the Petitioner, Wiley Branton, attended a meeting held at a point designated as the Mt. Zion Church House (R.13). The proof showed that the Petitioner brought to the meeting, which was designated a political meeting, a number of mimeographed ballots (R.13). The mimeographed ballots were introduced in evidence as State's Exhibit "A" (R.29-30). The proof showed that these ballots were passed out among the people attending the meeting and that with these ballots pencils were distributed (R.13). That the Petitioner started with the candidates for Governor and instructed the audience how to vote. The instructions were given, according to the testimony, in these words (R.14):

"Q. I will ask this question. How, Harry, did he express a choice in the Governor's race? Did he tell you how he was going to vote; who he was going to vote for?

A. He said who he was going to vote for.

Q. He said who he was going to vote for?

A. Yes, sir, he told us how we should vote.

Q. (R.14) Let me ask this question. Did he go down the list on all these races, the Associate Justices, the Prosecuting Attorney, Chancellor, etc., did he go down the list on each race?

A. Each race.

Q. Did he discuss every race?

A. Yes, sir, he did.

Q. He did? What did he say about how you all should vote?

A. He said he was going to vote his way and we could vote our way, but we would get better results if we would all go solid, but he was going to vote his way.

Q. He told you what his way was then after each race? Look at this again, you note his pencil marks through various names?

A. Yes, sir.

Q. After each race, what would happen? What did you do with the pencil after each race?

A. Gave them back.

Q. You gave them back after the meeting was over, I suppose?

A. Yes, sir.

Q. What did you do after each race?

A. What did I do after each race?

Q. What did you do, use the pencil, what did you have them for?

A. For scratching names.

Q. After he got through talking to them, you scratched the names?

A. Yes, sir.

Q. He showed you how to vote?

A. He did.

THE COURT:

(R.15) "What became of that ballot you had?

A. Which ballot, what he gave us to vote on?

THE COURT:

Yes.

A. Some of them taken them home, I reckon."

At the conclusion of the State's testimony, the Petitioner elected not to place any testimony on the stand. This case is therefore one in which the facts are undisputed.

REASONS FOR REFUSING THE WRIT

I

The Supreme Court of Arkansas correctly holds that the prominent object in the election laws passed by American legislation is stated in the Court's opinion in *Branton* v. *State*, 214 Ark. 861, p. 866:

> "Judge Cooley further says, concerning freedom of elections (p.1389): 'To keep every election free of all the influences and surroundings which might bear improperly upon it or might impel the electors to cast their suffrages otherwise than as their judgments would dictate has always been a prominent object in American legislation.'"

The primary object in the mind of the Legislature in passing Section 20 of Act 123 of 1935 was to eliminate the dangers and evils inherent in the system of so-called "block voting" within the State of Arkansas. This is a case wherein the Supreme Court of Arkansas decided and applied a state statute under the facts in the case. The violation, as found by the Arkansas Court, is in the "printing or distributing ballots outside of those ballots ordered for use in the election, for the purpose of instructing voters how to vote". In other words, the official ballot is the ballot printed under the direction of the proper Central Committee or the proper election commission. Any other ballots are unofficial ballots and when they are printed or distributed for a purpose, then the act of printing or distributing the ballots becomes unlawful. The facts reveal that the purpose of the distribution of the mimeographed ballots was for the purpose of showing and instructing as many persons as possible as to which candidate they should vote for. The proof showed

that the instruction took the form of marking through the name of the candidate, after which the holder of the unofficial ballot was at liberty to take the ballot with him.

The Supreme Court of Arkansas, in affirming the conviction, has adopted that theory of the case and under the facts there could be no question about the guilt of the Petitioner. In other words, as defined by the Supreme Court in *Branton* v. *State, supra,* the "instructing voters how to vote" was the instruction of the voter as to which candidate the voter should cast his ballot for. Certainly it will not be denied that a state has the power to prohibit the printing of ballots other than those which are to be termed "Official Ballots" and used in the election. The Supreme Court of Arkansas construed the ballots in the instant case as "ballots." The definition of the word "ballot" is found in 18 Am. J., Sec. 159, p. 286:

> "The word 'ballot' is automatically assumed to be derived from the Greek word 'ballo'—'to throw'—although it has been assigned a French derivation. The word is used both as a verb and as a noun. In the former sense it means 'to ballot'; in the latter sense it is applied to the implements of voting, which originally were shells, pebbles, beans, or balls. Later a slip of paper was substituted on which were printed the names of the candidates to be voted for, and it is in this sense that the word has come to be generally used."

It is evident, therefore, that this case hinged upon whether or not the ballots distributed by the Petitioner were such ballots as the Legislature had in mind in Act 123 of 1935. The word "ballot" in the act is used as a noun. The Supreme Court of Arkansas, in construing Act 123, *supra,* held that such "ballots" as the Petitioner distributed were

ballots as defined by Act 123, *supra*. The Petitioner bases his case on the theory that the "ballots" distributed by the Petitioner were not "ballots" within the meaning of the State law. The Supreme Court of the United States in the case of *Prince* v. *Massachusetts*, 321 U. S. p. 158-171, 88 Law Ed. 645, on p. 163, uses these words:

> "As the case reaches us, the question is no longer open whether what the child did was a 'sale' or an 'offer to sell' within Sec. 69 or was worked within Sec. 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law. The only question remaining, therefore, is whether, as construed and applied, the statute is valid."

In the instant case, therefore, the Supreme Court of Arkansas, having decided what the word "ballots" meant, under Arkansas election procedure and law, referred to ballots such as the Petitioner distributed. This question is foreclosed as far as the Petitioner is concerned. The undisputed proof reveals that the Petitioner did distribute the unlawful "ballots" and that he instructed his listeners as to which candidate they should vote for by use of these unlawful "ballots". As construed and applied to the facts in this case, the statute is clearly valid and no federal question is presented under the reason in *Prince* v. *Massachusetts, supra*.

As we understand the rule, as stated in *United Gas Company* v. *Texas*, 303 U. S. 123, 82 Law Ed. 702:

> "The United States Supreme Court will review the findings of fact by state court, (1) where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it, and, (2) where a conclusion of law as

> to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts, such analysis being made, not to allow issues of fact arising on conflicting testimony or inference, but to perform the court's proper function in deciding the question of law arising upon the findings which the evidence permits."

It is certain in this case that the finding of the Supreme Court of Arkansas is abundantly supported by the evidence and that the conclusion of law is not so intermingled as to make it necessary for this Court to analyze the facts.

The Supreme Court of the United States in the case of *Benjamin Gitlow* v. *People of the State of New York*, 268 U. S. p. 652, 69 Law Ed. 1138, states the rule:

> "It is a fundamental principle long established that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish without responsibility whatever one may choose. * * * That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite the crime or disturb the public peace, is not open to question."

In *Gryger* v. *Burke, Warden*, 334 U. S. 728:

> "We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied."

United States v. *Petrillo,* 332 U. S 1, at p. 7:

> "We think that the language Congress used provides an adequate warning as to what conduct falls under its ban and numerous boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is diffcult to determine the side of the line on which a particular fact situation falls, is no sufficient reason to hold the language too ambiguous to define a criminal offense."

CONCLUSION

The practice denounced by the statute was a known evil of long standing at the time the Legislature of Arkansas passed Act 123 of 1935. The police power of the State is not inhibited by the Constitution of the State or of the United States against governmental regulations made for the public welfare that are not unreasonable or arbitrary and that have a real and substantial relation to the object sought to be attained. *Ex parte Hawthorne,* 156 So. 619. Freedom of speech is not absolute. *Terminiello* v. *Chicago,* U. S. Reports No. 1, Vol. 337, p. 1. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568.

In *Chaplinsky* v. *New Hampshire, supra,* the Court stated:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of

which have never been thought to raise any Constitutional problem."

We therefore respectfully submit that the statute here involved, as applied to the facts in this case, is not an abridgment of Petitioner's constitutional rights under the First and Fourteenth Amendments and is a valid exercise of the State's police power.

Respectfully submitted

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